IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: RAILWAY INDUSTRY EMPLOYEE NO-POACH ANTITRUST LITIGATION. Civil Action No. 18-798

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Transcript of proceedings on February 25, 2019 United States District Court, Pittsburgh, PA, before Judge Joy Flowers Conti.

APPEARANCES:

For the Plaintiffs: Dean M. Harvey, Esquire
Kathleen M. Konopka, Esquire
Gerard A. Dever, Esquire
Kelly K. Iverson, Esquire

For the United States: Nickolai Levin, Esquire
Doha G. Mekki, Esquire

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P R O C E E D I N G S

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2:12 p.m.

THE COURT: Good afternoon. Please be seated. This is a hearing on a motion to dismiss, which was filed in the multi district litigation, In Re: Railway Industry Employee No Poach Antitrust Litigation at master docket No. 18-798 MDL No. 2850.

Will counsel please enter your appearance for the record?

MR. HARVEY: Good afternoon, Your Honor. Dean Harvey of Lieff Cabraser Heimann and Bernstein for the plaintiffs.

MS. KONOPKA: Good afternoon, Your Honor. Kathleen Konopka also of Lieff Cabraser Heimann and Bernstein for the plaintiffs.

MR. DEVER: Good afternoon, Your Honor. Jerry Dever from Fine, Kaplan and Black also for the plaintiffs.

MS. IVERSON: Kelly Iverson with Carlson Lynch liaison counsel for the plaintiffs.

THE COURT: Who is going to be arguing on behalf of the plaintiffs?

MR. HARVEY: I will be taking the lead, Your Honor, and I will be splitting the argument with Ms. Konopka and Mr. Dever depending on the questions and issues that arise.

THE COURT: It's only as to specific questions?

MR. HARVEY: That's right.

THE COURT: So it won't be two people arguing the same question?

MR. HARVEY: That's right.

THE COURT: Thank you.

MR. KIERNAN: Good afternoon, Your Honor. David Kiernan with Jones Day on behalf of the Wabtec defendants.

MR. HAMER: Good afternoon, Your Honor. Mark Hamer Baker & McKenzie on behalf of the Knorr defendants.

MS. STILLMAN: Good afternoon, Your Honor. Catherine Stillman, Baker & McKenzie, representing the Knorr defendants.

MR. BIRSIC: Your Honor, Tom Birsic from K&L Gates, and I'm here with my partner, Melissa Tea, on behalf of the defendants. We will have two counsel arguing, and they will split the issues. Mr. Kiernan and Mr. Hamer will be arguing the motion for the defendants.

THE COURT: Okay. Just between those two?

MR. BIRSIC: Yes.

THE COURT: Okay. For the government?

MS. MEKKI: Good afternoon, Your Honor. Doha Mekki on behalf of the United States.

MR. LEVIN: Nickolai Levin on behalf of the United States.

THE COURT: And if someone is going to argue, who will be it?

MS. MEKKI: That will be me, Your Honor.

THE COURT: This matter arises from a consolidated class action complaint which was filed on October 12, 2018. Plaintiffs are seeking to represent a class of plaintiffs, and there's one claim for relief which is a violation of the Sherman Act, 15 United States Code Section 1.

On November 27, 2018, all the defendants filed a motion to dismiss for failure to state a claim and to strike class action allegations and a brief in support of that motion was filed.

There were responses to that filed by the plaintiffs. The government filed a notice of intent to file a statement of interest which was then filed, and the defendants filed a reply brief in support of their joint motion. There was also a supplemental notice of a recent decision that was filed by the plaintiffs. This is the time set for the hearing.

Before we go into the hearing and I hear from the parties, I just want to give you my preliminary assessment of where we are. The main thrust which would be the death knell for this action is that the plaintiffs should have set forth a market analysis, because in this situation, the rule of reason would apply in how the court would analyze it, and there would be insufficient factual allegations in the complaint to support a rule of reason analysis.

The plaintiffs, joined by the government, have argued

to the contrary and said there is sufficient pleading for a per se analysis in this case, and that's all that would be done.

The court is mindful that in the Supreme Court decision, Business Electronics Corp versus Sharp Electronics Corp, 485 U.S. 717 (1988) at page 726, the Supreme Court recognized there is a presumption in favor of a rule of reason standard. And under that rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of produces significant anti-competitive effects within the relevant product and geographic markets, in re Milk Antitrust Litigation, 801 Fed. Supp. 2nd 705 (Eastern District of Tennessee 2011).

That presumption, however, may be overcome and a finding that the rule of reason applies may be made when history and analysis have shown that in sufficiently similar circumstances, the rule of reason unequivocally results in a finding of liability -- I'm sorry, that the per se rule unequivocally results in a finding of liability, Consultants and Designers, Inc. versus Butler Service Group, Inc., 720 Fed.2d 1553 (11th circuit 1983) and that would be at page 1562.

Some of the most prominent treatises recognize that when there is an agreement among employers that they will not compete against each other for the services of a particular

employee or prospective employee is a service division agreement analogous to a product division agreement, VII Phillip E. Areeda, Herbert Hovenkamp, Antitrust Law, paragraph 352 (Fourth Edition 2013).

And it has been recognized that when you have horizontal restraints including price fixing and market division, those would be anti-competitive by their very nature, Lifewatch Services, Inc. versus Highmark, Inc., 902 Fed.3d 323 (Third Circuit 2018).

So the issue is whether there is a division agreement here which is analogous to a market division, and my understanding of the case law is that employees for this analysis are treated as the product, and when you are dividing and having a division of the services, which would be the employees, the products, that would be analogous to a market division, and therefore, per se rule could plausibly apply.

That's what the court has to determine at this stage. Is it plausible? Not that it in fact meets that standard.

Now, the risk for the plaintiffs in this type of situation is then, after you go through discovery and you are in a summary judgment situation, maybe there's not sufficient facts to support that and perhaps you wouldn't apply the per se, but at this stage of the proceedings, which is just at the motion to dismiss, my initial sense would be that it would be sufficient to pass muster at this stage in terms of a per se

analysis if the plaintiffs and the government are correct that the employees are akin to products, and once you have service division in terms of the employees, that is sufficient.

Then when we get to the class action issues, there are a couple problems that I have there. Mainly, this would be for the plaintiffs to address, and that is they are linking here skilled labor, and I don't know what skilled labor means in this context, because you could have someone who's working on a line making a piece of equipment that might qualify as skilled even though they are an hourly employee.

You may have all salaried employees and there could be some proof that could come later, and again, at this stage, when I'm looking at the class allegations, I'm not necessarily looking for plausibility but whether it would be possible for them to show this on a fully developed motion for a class certification, so I just am not clear about who all the employees are, because if you would have an hourly employee like a janitor that would have no special technical skills that might be relevant, I just don't know that it would be possible for the antitrust violations to reach down and sweep in clerical or hourly employees who are not performing any special technical skill.

So I'm trying to assess how that could be possible at all, you know, in the real world when you are looking at this class, and there were no cases where all employees, including

clerical, non-skilled employees or hourly versus salaried.

The case law that I saw where there was more than technical skills that were being addressed even in dicta would have looked at some salaried employees so that if you start out at a certain level, you may be at X rate and you can go up in your salary ranges up to a different level and there may be a progression, so that if you are within the same salary team, you may be compressed because of the highest one is going to be lower, then they ratchet it down.

So maybe plausibly or possibly you could show something like that, but I just don't know how it's possible to have all of these employees together, so I have a great deal of difficulty with that.

The second main issue that was raised by the defendants has to do with the timing of the conspiracies. There are allegations about bilateral agreements, and as I understand it, the allegations are, and I'll just use the abbreviations for the defendant's names, Wabtec and Knorr began their agreement no later than some point in 2009, so that's the first bilateral agreement.

The second bilateral agreement that's identified is Knorr and Faiveley which began no later than 2011.

Then there's the third one where Wabtec merged with Faiveley, so Faiveley became Wabtec or vice versa, and there was already the agreements in place with Knorr, so you could

argue all three of the prior entities were now combined, were now somehow related because Faiveley had an agreement with Knorr and Wabtec had an agreement with Knorr.

And then the fourth situation was sometime in 2015, Wabtec and Faiveley merged, and it's clear at that time until at least the DOJ action, the Department of Justice action, where you would have now Wabtec and Knorr definitely together.

So you would have four iterations, and maybe you'll stop after the third one if it's sufficient to show Wabtec and Faiveley had an agreement and Faiveley and Wabtec separately had agreements with Knorr. Maybe that's enough to circle the loop up. Maybe you could have just three iterations, but it would be clear to this court that there's no allegations about Faiveley until 2011, so how can you hold all those employees of Knorr back to 2009? It's just not going to work.

And then you had Knorr and Faiveley but not Wabtec and Faiveley, so those iterations can affect what the class would be, and so maybe you need various subclasses here to address the time frames and particular agreements that were in issue.

I would be interested to know if anyone feels that you had to have all three together or you couldn't have recovery, rather than, as I understood the thrust of the defendants' arguments, that you have to look at whose employees are affected during those time frames to see what

the recoveries could be, so that's where you may need some refinement in the class definition.

The other issue that has come up with the subsidiaries. There's an agreement that the one subsidiary is, by agreement, going to be out and that was --

MR. HARVEY: Ricon.

THE COURT: Yes. Ricon. What was the name?

MR. HARVEY: R-i-c-o-n.

THE COURT: Yes, Ricon. All the agreements by both sides so that entity should not be a named defendant. There is a dispute with respect to Bendix, and in some of the most recent briefing that came in, it was articulated by the defendants that Bendix would only be in under an aiding and abetting theory, and if that's the case, the case law does not support that that subsidiary could be a direct defendant in the case. That's MCI Telecommunications Corp versus Graphnet, Inc., 851 Fed. Supp. 126 (District of New Jersey 1995) and Top Rank, Inc. versus Haymon, 2015 Westlaw 994, 8936 at *16 (Central District California October 16, 2015).

In that decision, the court concluded that aiding and abetting is not an independent theory of civil liability under the Sherman Act. Each of those decisions cites various other decisions for support, and that sort of strikes the court as being the most rational approach here to the Bendix analysis, because if you have the parent entity which is the one that

had the direct agreements with the defendants, then the subsidiary would just be a matter of evidence that would be coming in that could be presented at trial, but the subsidiary is really the same participant as the parent for purposes of the antitrust analysis, because you can't conspire with yourself, and if there's no direct evidence that Bendix had a separate agreement with the other parties, it wouldn't support a per se violation by Bendix. Perhaps for the parent entity, but that's where the direct agreement is that supports the per se analysis.

So my preliminary assessment would be that Bendix should likely be out as well if they are only in here on an aiding and abetting, but it would be without prejudice for that evidence to come in. So that's, I think, sort of the global view that I have at this time with respect to the positions that have been raised by the parties, and I'll turn first to the defendants to hear your position.

I don't want to interfere with your full presentation here, but I thought it would be helpful to you to get a sense of my overall view having reviewed all of your submissions.

MR. KIERNAN: Your Honor, may I approach?

THE COURT: Yes, you may.

MR. KIERNAN: Your Honor, what I will be addressing today, unless you would like us to go in a different order --

THE COURT: I don't want to interfere with your

preparations. You can give your preparation. I just thought you might want to be informed about my overall assessment.

MR. KIERNAN: Terrific. I will be addressing the overarching conspiracy claim as well as the class allegations, and my colleague, Mr. Hamer, will be handling the per se versus rule of reason and the Bendix, because Bendix is associated with Knorr.

And the reason we thought to do it in that order is I understand that the Department of Justice may have some arguments on per se versus rule of reason so we thought let's get through the class allegations overarching conspiracy because there may be three counsel talking about per se versus rule of reason.

THE COURT: Okay. Did you understand my thought about how you would break them up because there are differences, and I think your argument about how can the employees of Faiveley be involved from 2009 at least until 2011, and then when you get to 2011, you still don't have Faiveley tied into Wabtec, although maybe there could be some arguments made, but it's not as crystal clear.

MR. KIERNAN: Right. What I heard, Your Honor, just as I was listening to this is, and it's one reason we brought the motion to dismiss on these issues, is underlying all of these issues that we're discussing is there is a mismatch between the factual allegations in the complaint and the

actual causes of action in claims.

Taking, for example, the overarching conspiracy versus bilaterals. Like the Department of Justice, the plaintiffs' factual allegations challenge three bilateral agreements. I'm going to walk through those in a minute, but their class allegations cover all employees for all time which, in essence, is an allegation of an overarching conspiracy.

The only way that plaintiffs could find liability against all defendants from 2009 to the present is if there was an overarching conspiracy, but they don't have any factual allegations supporting overarching conspiracy.

With respect to the class, we see a similar type strategem in the complaint where, although the plaintiffs had detailed allegations about skilled employees, project managers, machinists, when you get to the class allegations, they now seek liability for all employees across all 50 states. Frankly, it's the same with per se versus rule of reason. The reason why they are alleging per se is if they allege rule of reason, they are required to --

THE COURT: I understand that.

MR. KIERNAN: -- a relevant market, and if they have to allege a relevant market, that will underscore why the class allegations will not survive a motion to dismiss. They will not survive a motion to dismiss, so we need to clean up

the complaint.

THE COURT: You do understand it's very rare for a court to strike the class allegations at this stage of the proceedings?

MR. KIERNAN: I'm familiar with both of your orders that Your Honor related to that, but I'm going to explain why this case is one of those rare instances where the class allegations should either be stricken or at a minimum modified or amended which is in the court's discretion to do under 23 (2)(d).

Let me start with the overarching conspiracy and I want to walk through those specific bilateral agreements, because one of the descriptions was just slightly off. So there's the Wabtec/Knorr. That was no later than 2009. Faiveley is not alleged to have been a party to that agreement. There are no communications with Faiveley. There's no knowledge alleged by Faiveley of that agreement.

Then in 2011, plaintiffs allege Knorr and Faiveley had an agreement. There's no allegations that Wabtec was a party to that agreement or Wabtec had knowledge of that agreement.

Then in 2014, the plaintiffs allege that Wabtec and Faiveley had an agreement. Again, Knorr -- there's no allegations that Knorr knew about the agreement, that Knorr was a party to the agreement, that Knorr participated in the

agreement. As you noted in 2015, Wabtec acquired Faiveley.

What they, like the DOJ, the complaint alleges and challenges just those three bilateral agreements, but the class allegations in the causes of action seek to hold Faiveley liable for the agreement between Wabtec and Knorr back in 2009. They also seek to hold Wabtec liable for the agreement between --

THE COURT: You are winning on that.

MR. KIERNAN: I'm winning on it? Then I will move on, Your Honor. But the other reason this is relevant not only to understand the liability is also for the class allegations, so in addition to dismissing any or striking any of the overarching conspiracy allegations, the plaintiffs would also have to re-allege or re-plead the class allegations, because right now, as we discussed, the class allegations seek to represent all employees at Faiveley for agreements that Faiveley was not a party to, and whether that results in subclasses or, as I think you were mentioning could these be three different or perhaps even more different classes of employees, if it survived the motion to dismiss, something would have to be done to clarify and tie the employee absent class members to the specific agreement at issue.

I'm going to move on to the class allegations. Your Honor, the reason why this is one of those rare cases is the

plaintiffs in this case would not be able to meet the Rule 23 requirements. As the case law makes clear, the burden still, even at a motion to strike phase, the burden remains with the plaintiff.

THE COURT: By the way, whoever's phone went off needs to go out. It's somebody on the phone? That reminds me, who is on the phone? You need to enter your appearance.

Who is on the phone?

MR. SALAHI: You have Yaman Salahi for plaintiffs from Lieff Cabraser. I would just remind whoever else is on the phone to please mute their line.

THE COURT: That's the problem. We're getting unmuted phone information. Who else is on the line?

MS. NYLEN: Hi. Leah Nylen from MLex. I'm a reporter.

THE COURT: It was up to the parties if they wanted to provide that information so you did. Who else is on the line? So if you are on the line, if you are not one of the parties who are speaking, you need to mute your line because we are hearing cell phones ringing. We are hearing some other background noise and it's distracting. So please mute your line. Thank you.

MR. KIERNAN: Thank you, Your Honor. Appreciate it. On a motion to strike, the burden remains with the plaintiff to show that they can meet the Rule 23 requirements. It is

undisputed that one of the requirements in addition to the Rule 23(a) factors, the plaintiffs have to show under 23(b)(3) that antitrust injury will be predominant, that individual issues will not predominate or overcome an issue with respect to antitrust injury.

Weisfeld sets it out pretty plainly that the plaintiffs have to show a common method for antitrust injury. They will not be able to do that with this class, and I want to take it through two because we have been focusing on the unskilled, but they have the same problem with the skilled for the very reason that you identified, which is we don't have a definition for skilled labor in this case.

Plaintiffs have not explained how --

THE COURT: It's really more of an ascertainability issue. If you use the word skilled, who is skilled so you can ascertain them?

MR. KIERNAN: Let's say it was -- you could imagine if it were all project managers, you could have a class of all project managers. You have a class of all manager of sulfur engineers like two of the named plaintiffs. In one of the cases we cite in the Walmart case, it was all assistant managers in various stores, so you had a very discrete title. You knew which employees were at issue, which labor markets, which job opportunities, their salary, compensation, information. You knew exactly what could be studied.

Here what we have is the plaintiffs seek to represent project managers, manager of sulfur engineers, technicians, machinists, positive train control managers, plus other skilled employees across all 50 states, so the five named plaintiffs are located in five different states, five different states.

They have no facts explaining why the suppression of compensation of say Plaintiff Baldassano who is a project manager in Maryland would show a suppression of compensation of Plaintiff Escalera who is a field service technician in Massachusetts. There are no allegations in the complaint explaining how they would do that or why we should presume that impact to a project manager in one state would tell us anything.

THE COURT: I need you to address when you are looking at the class -- motion to strike the class at the pleading stage, it's not the Iqbal Twombly standard. It's really is it possible that they could all be together.

MR. KIERNAN: Let's say it's possible that all the skilled employees could be together. That's what the Department of Justice alleged and focused on. They focused on the same job titles that are represented by the named plaintiffs and skilled employees, however they would define that in discovery. They certainly couldn't show, and it's not possible that they would have an all employee class that would

cover both skilled and unskilled, and it's why, Your Honor, and I've done maybe five of these types of cases, and I've not been in a case yet where a class was certified with all employees. I've seen it tried. I was in the High-Tech case.

THE COURT: That's still limited to salary employees. I read that opinion carefully, and from the beginning, they were just talking about salaried employees as opposed to hourly employees that may be what typically happens with janitorial staff and that kind of thing.

MR. KIERNAN: Right, and there were no issues about clerical staff or mail room clerks, any hourly employees to speak of. These were highly skilled technical employees.

THE COURT: That's what ultimately the plaintiffs move forward on.

MR. KIERNAN: That's right. In part, because the court had noted the first round of class, and we had to do this twice, Your Honor, which is one of the reasons why we moved to strike is it is an expensive exercise to go through the entire class cert hearing, the briefing, the hearing, the economist to get rid of an all employee class, and we have to do it all over again when they assert now we want to do a more limited class. We want to avoid that at the pleading stage. That's why we move to strike these class allegations now.

When you look at their complaint, and particularly paragraphs 31 through 38 of the complaint, this is where they

set forth their theory of antitrust liability, their theory of impact. What they allege is their theory is based on the premise that the specialized skilled employees are, quote, "in high demand for and limited supply of skilled employees who have rail industry experience. As a result, critical jobs in the rail industry can remain vacant for months."

That does not describe a janitor, a clerical person, an administrative assistant, any hourly employee.

THE COURT: Their argument on that is it's a compression theory, that if the higher people are lower paid, that's going to trickle down uniformly through some type of program that the company would have in terms of setting pay scales.

MR. KIERNAN: So let's go on through paragraphs 31 through 38. That's what they put in their opposition. That's not in their complaint. If they put that in the complaint, we can address that, but they did not put that in their pleadings. They go on to state, "Firms in the rail industry rely on direct solicitation of employees of other rail companies because those individuals had the specialized skills necessary and may be unresponsive to other methods of recruiting. In a properly functioning, lawfully competitive labor market, rail industry employers compete with one another to attract highly skilled talent."

Throughout the allegations, Your Honor, that is their

focus. Paragraph 35, I think, puts it best, and this is the entire theory of their antitrust impact liability. "By soliciting and hiring employees from other rail industry employers, a company is able to take advantage of the efforts its rival has expended in identifying and training employees. By contrast, hiring employees directly out of a training program comes with none of those benefits."

There are no allegations related to unskilled employees, and the DOJ, their focus was on skilled employees. They focus almost entirely on project management, engineering, sales and corporate officers. Those were the job titles, after investigating the various agreements and how they were implemented. They filed a complaint. There was ultimately a final judgment and that's what they focused on, skilled employees, namely project management, engineering, sales and corporate officers.

With respect to the argument that we saw in the opposition, you are right, their basic argument is that but for the conduct, but for these agreements, skilled employees would have been recruited by one of the other defendants and that would have caused one of the other defendants to either increase that employee's pay or start increasing other employees' pay within that title, within those skilled job titles, and then it may trickle over to others, and they allege in paragraph 38 that one reason it may trickle over is

because many rail industry workers are highly specialized and integrated into teams tied to specific functions.

Some workers who move to a position at different companies may bring the others with them. They are not bringing the janitors and the cafeteria workers over to the other company, or if they are, there are certainly no allegations in the complaint about that.

So what we have here is a blunderbuss class that includes all employees across not only the five states where the plaintiffs were employed but across all 50 states.

They are not skilled employees. There's no theory of harm set forth in the complaint that makes any sense. The focus of the specific allegations are on the skilled employees, not on unskilled employees.

So at a minimum, Your Honor, whether it's -- our belief is that the class allegations should be stricken for both skilled and unskilled, but to the extent that the skilled employees could go forward, at a minimum, they should have to modify their class allegations to include the skilled employees that they seek to represent in this case.

If they are going to seek -- I don't think it's possible -- to represent any others, they are required under Rule 23 -- let's focus on Rule 23 -- to provide specific allegations that support including them in class allegations.

Your Honor, I'll end with, you know, the point that

we raised before that when you look at all the no poach cases, there's close to a dozen of them, or antitrust cases involving employee wages, all of them have a limited class, and then you take those, the ones that have been limited to specific types of employees, there are several like the Weisfeld case, the In Re Comp, managerial cases, the nurses cases, where the court denied class because the individual issues have been predominant over the common issues.

THE COURT: Those were at the class certification stage.

MR. KIERNAN: They were at the class stage, but what they underscore is if it fails at the class stage for even a limited job title, it underscores why they will not be able to show a class of all employees. It's just not going to be possible, and our belief is, to avoid the frankly millions of dollars and the court's time spent on doing what we did in the High-Tech case, which was -- and frankly, in the Seaman versus Duke case, where we litigate class for all employees, which they'll never be able to do, we'll get a decision that denies class, and we're going to have to go through it all over again.

Instead, what the plaintiffs should do is what they did in the DreamWorks case, which is they limited at the start to specialized employees. The Intuit case I was involved in, they limited at the start to the skilled employees rather than

alleging this blunderbuss class action.

THE COURT: Thank you.

MR. KIERNAN: Any questions, Your Honor?

THE COURT: No. Thank you. Somebody else is going to address the rule of reason?

MR. KIERNAN: Would you like Mr. Hamer to address the rule of reason now?

THE COURT: No. Let's deal with the class allegations first and we'll come back to the rule of reason at the end.

MR. HARVEY: Good afternoon, Your Honor. I think it's important in light of Mr. Kiernan's argument to take a step back and ask ourselves why are we here today. We are here because these defendants entered into an agreement not to compete for each other's employees period.

There is no allegation in the DOJ's complaint or certainly in the quotations from the documents, from the DOJ's complaint that the defendants, at the time of engaging in their misconduct, saw fit to limit the restriction to only skilled employees. They decided to restrict competition for all employees.

THE COURT: You are saying it's possible that if a janitor wanted to move and work for the other company, they would be precluded from doing that and that would affect the janitor's salary even though they are not skilled in the sense

of having a special skill in the industry?

MR. HARVEY: In the scenario you just described, absolutely, because the individual has tried to move and was denied it, but I would take a step back and make it even more difficult for me. What if the janitor never applied? It's an hourly janitor working at Wabtec. Has no idea of any restriction. How is that person -- how is it possible that that person was injured?

In answering that question, let's first think about, at class certification, how would any member of the class -- not even a class certification. If that janitor filed his own action, how would that person prove his individual claim? He would first have to prove the violation.

That evidence would be identical to any member of the class because you are proving an agreement that restricted competition for all employees. That's going to be the dominant -- I would say predominant issue at trial. Same for everybody, from the most skilled engineer to the least skilled janitor.

Second impact, now any member of the class is not going to, and it's certainly not our theory of the case, that to establish injury has to prove that they personally would have received a call, would have accepted that job.

THE COURT: You would have to prove antitrust impact.

MR. HARVEY: Right. So where does that impact come

from? It comes from proving up a pay structure within the firm that, you know, I think as is the case in almost any firm and certainly corporations as large and sophisticated as these defendants, compensation decisions are not made in one-off negotiations. They are a very formal process that occur once a year generally, and those in charge of determining the budget for compensation for the following year get together in a room.

This is a very important decision involving the most senior managers of the company, and they figure out, well, do we need to raise comp for this year? Well, what's going on with the cost of living? What's going on with competition for our employees? But for this agreement, there would have been more competition. In that room --

THE COURT: For who?

MR. HARVEY: For the employees. Now --

THE COURT: That's what I'm struggling with here. How is it possible, in the real world, if you are working as a janitor in this courthouse and a company down the street, you find a position where they are going to pay two dollars more an hour. So you go over there, but an employee in that department -- I just think it's not possible that somebody at the janitorial level is going to be affected by no-poach agreement unless they were janitorial companies, and that's what they were doing and they were supplying janitorial

services and then it would be analogous to what we have here.

It just doesn't strike the court that it's possible, unless you had such a compression, and I was trying to envision all these highest level people sitting down and saying, oops, our janitors, other than a cost of living, which is not tied to this compete, so other than for a cost of living or looking at we can't get good janitors because the company down the street is hiring them so we need to raise our prices, what is it about the higher level salaried people who they want to keep and they don't want the other company that's in their bilateral agreement to have those employees be able to poached?

Nobody is worrying about poaching the janitors, so you would have to say somehow the salaries that are being paid to the higher level employees, there's some kind of a chain that will come down compressing the salaries because of the highest top, and I can't think that that's possible.

MR. HARVEY: Well, that's an empirical question, and it's an empirical question which we will answer with expert analysis of defendant's own data. This is a question capable of an answer.

THE COURT: Why should we go through that if it doesn't come within the range of possibility at this stage? That's what the defendants are arguing here, and we have the Supreme Court has come out, that's what Iqbal and Twombly was

all about, although we are not applying that in the class allegation issue, but clearly the Supreme Court has been concerned as the rules committee and the new rules that have been adopted with the cost of litigation, and if it's going to cost money to run that down, to have your experts, their experts, everybody looking at that, if it's not just possible, if you can tell me, Your Honor, there's X company or Y company or there's literature out there that once you compress salaries at the high level, it goes down to the janitors, if there's something out there that could bring it within the range of possibility, even though it's not actuality when you look at the facts, they didn't have that for these companies, but I can't even get there, because I can't see that it's possible in the real world.

MR. HARVEY: Sure. So let me provide two real world examples. How labor markets work can be surprising, and so one example was from the High-Tech case which Mr. Kiernan --

THE COURT: That was about salaried people initially.

MR. HARVEY: No. Well, let me provide one example here and that is that there was at least one documented instance in which one company enforced the no-poach agreement as to a food worker. The other company wanted to hire someone from the cafeteria, and it went up to the most senior level of the company, and they said you can't do that because of our no-poach agreement. So it does happen.

Secondly, another real world example from the Duke UNC case that Mr. Kiernan mentioned which we are lead counsel for. In that case, certainly at class certification, it was not part of the certified class, but you are asking me a different question which is, is it possible.

There was a very interesting document produced, which is public, where Duke and UNC, they are the two defendants, there's an internal document at UNC that said Duke has decided to increase the pay for its minimum wage workers, the lowest, most unskilled workers in their workforce. They've decided to increase their pay by five percent, and at UNC, this person saw the article, forwarded it to the CEO of the entire health system, and said should we do the same, should we match, and if we do, what will that do to the pay for everyone above them.

There it's going in the other direction, but you would imagine that for the least skilled people perhaps out of the box without seeing evidence of that kind, you may think what does it matter? There's a wider labor market for those kinds of people. They wouldn't care less what Duke is paying because there's so many competitors out there, when in fact they do. It's an empirical question that can sometimes have surprising answers.

I think here -- we are counsel in all those cases, and we faced this decision when we were pleading our case. We

had a lot of discussion about it. The reason why we pled it the way we did is that it reflects the scope of defendant's own misconduct.

So our question was, out of the box, should we limit the class before we get the pay data, before we know as a matter of fact if pay is shared, which is a question that we will confirm or refute based on the pay data that we get, and if we -- suppose we were to say only skilled workers in this class. We're going to take everyone out from the outset. What would happen? Undoubtedly, the defendants would draw that line we were just talking about.

THE COURT: They would do it in the discovery. They wouldn't give you any of the other information.

MR. HARVEY: Exactly. It's very ambiguous where you draw that line. They would draw it very narrowly. We would choose it widely. We would have disputes with the special master. I don't think it's practical.

Also with respect to the questions of burden, I'm not sure what burden he's talking about. If this were a discovery dispute and we wanted the data and they didn't want to give it to us, the question would be is it relevant. I would say certainly it is. If they don't want to produce it, they have to explain the burden.

Now, I haven't heard any argument that the pay data for these hourly lower skilled employees is maintained

separately. It would be an entirely different project to pull data for those employees compared to these. It would multiply our costs by a factor of five, so on and so forth. You have to justify assertions of burden with specific facts, and we haven't heard that, and so I think -- the question here is, is it conceivable. Is it possible? I should say the standard is the burden is on defendants to prove that it is impossible.

We are not there. We are not there. And believe me, once we have the pay data and the evidence, we will not overreach. We have gone through these cases several times. We have a lot of experience with them. We will provide to the court in our class certification motion the class that we think is cohesive, where we have one damages model that can prove up damages for every member of that class, and we may decide that we will limit it, but we will do it based upon information like lists of job titles which we don't have, like internal documents that describe -- for example, it may very well be the case that there's a different HR process for skilled workers versus unskilled and that cascading phenomenon you described, you could say it really cuts off at that level, so this is the class and these people probably weren't injured.

That may happen, but I would respectfully submit that we should not do that on the pleadings in a vacuum. So unless Your Honor has any more questions on that issue, I'll move on.

THE COURT: I'm still struggling with that, but I do understand that there's a line as to where you would go in terms of whether it's skilled or salaried. Anybody can be affected, but there might be -- let's pick up the janitors in that. There are some industries where they pay lower scales just to begin with, and so if you are working like for a nonprofit and doing janitorial service for a nonprofit, maybe there's higher pay out there if you go for another -- work for a for profit as opposed to a nonprofit. I don't know. But it's hard to see that the janitorial level worker could be -- could have an antitrust impact.

MR. HARVEY: I'll tell you how we prove this up in our other cases. We used what are called sharing regressions.

THE COURT: Have you ever had this for all employees?

MR. HARVEY: Yes. We are -- and I would like to correct a comment Mr. Kiernan made. He said that no no-poach case seeks an all employee class. That's not correct. The franchise no-poach cases, which we are counsel in several of those, two of them had advanced beyond the pleadings, the McDonald's and Jimmy John's.

THE COURT: Those are the rule of reason cases, weren't they?

MR. HARVEY: No, they are -- in both of those cases, the court said that the -- well, for instance, in McDonald's, the court said the per se rule may apply. It will depend on

the facts as they come in, but it appears likely at the pleadings that the quick look will apply. We can talk about quick look if you like. It gets complicated.

THE COURT: That's not an issue here.

MR. HARVEY: Right. Same in Jimmy John's. There, the proposed class includes entry level McDonald's workers. That is the class that has advanced beyond the pleadings in both of those cases.

THE COURT: That includes the janitors?

MR. HARVEY: If they are employees at McDonald's, yes, it does. I'll say we don't know who their lower skilled employees are. It may be the case that they do what a lot of firms do, including our law firm, we don't have our own janitors. We subcontract them. We don't pay them ourselves directly. They are not a member of the class. These are only people who are paid directly as part of the same system.

THE COURT: I understand.

MR. HARVEY: I'll say out of the box, if you ask me to predict what would our class certification motion include, it probably would not include the equivalent of a janitor, but standing here before we know the facts or evidence, it doesn't make sense from our perspective to limit the case in that way before we see the facts or the evidence.

THE COURT: Do you want to talk about the different time frames and the different bilateral agreements and how

that affects your class definition?

MR. HARVEY: Yes. I first want to clarify from the arguments we heard what claims are affected by this issue. These are claims only by employees of Faiveley in 2009 and 2010. Nothing else is affected by this issue. That is because there are two defendants here today, Knorr and Wabtec.

THE COURT: Why would Wabtec have any allegation to Faiveley employees until 2014?

MR. HARVEY: Well, I agree that -- what I meant to say if I didn't say it was that it affects the claims at issue, so I agree with you that if it turns out that Faiveley was not involved in any no-poach agreement until 2011, then at class certification we would not likely -- it would be unlikely for us to seek to include employees of Faiveley from 2009 and 2010.

That means no other defendant in the case has any liability to those employees. As to everybody else, their claims are the same. They are now all employees of either Wabtec or Knorr, the two defendants before you today, and if Faiveley existed or not, if it were just, say, one agreement between Wabtec and Knorr, it wouldn't change anything about our analysis or the legal standard.

THE COURT: Just address this question: From 2009 starting you have Wabtec and Knorr. Then in 2011, you have Knorr and Faiveley, and it's not until 2014 that you have

Wabtec entering into some agreement with Faiveley, so between -- for Faiveley's employees, Wabtec would not be liable, but they wouldn't be liable anyway -- no. They would be. How can Wabtec be on the hook for any harm to Faiveley's employees until 2014?

MR. HARVEY: That is a question of whether Wabtec understood it was joining something broader than its individual agreement with Knorr. It doesn't have to know specifically about the agreement in order to be held liable for it.

Like any conspiracy, for example, the classic example from first year criminal law, the driver of the getaway car can be liable for the murder of the teller inside the bank even though the driver of the getaway was not in the bank because the driver of the getaway car is part of a conspiracy that can have these as consequences.

Now, there's no doubt that Knorr entered into a conspiracy with Wabtec to eliminate competition for its employees. The question is will the evidence show that Wabtec understood it was joining some broader effort beyond that one agreement, and that will be a question of the evidence.

I think at this stage, given that all three companies had agreements with the other companies and that they were -- they were proceeding contemporaneously with very similar elements, to me, it appears likely, beyond plausible, likely

that Wabtec understood there was something else going on, but we'll depose the executives. We'll get the documents and figure it out.

THE COURT: Even though they may have understood that, was Wabtec not poaching or following a no-poach with Faiveley and vice verse until 2014?

MR. HARVEY: Based upon the agreements alleged by the DOJ and what we have been able to determine before we filed our complaint -- I'll note as a footnote that since we filed our complaint, we now have the DOJ production which we've gone through, so if we would write the complaint again, it would look different. Based upon what we know now in the complaint there is no alleged direct agreement between Wabtec and Faiveley before 2014.

Should I continue?

THE COURT: Yes.

MR. HARVEY: As a practical matter, it makes no difference to the discovery produced. It makes no difference to the damages models, and at class certification, if we determine that --

THE COURT: Wouldn't it make a difference to the individual defendant that Wabtec wouldn't have to be producing or reviewing materials related to Faiveley until 2014 so it would reduce the burden there?

MR. HARVEY: Well, in antitrust conspiracy cases, and

there are many cases that has this proposition, the date of the start of the conspiracy is not the start of relevant evidence for the case, in part because you want to know why these companies entered into the agreement in the first place. Was there competition going on beforehand that was driving up compensation that provided the motivation for the agreement?

To prove damages, for example, you ideally want to go back to a point prior to the conspiracy so you can compare how pay worked before the conspiracy period with during the conspiracy period. That's a before/during analysis which is the kind of gold standard for a case like this.

So we are currently involved in meeting and conferring with defendants about the scope of discovery. We would certainly ask for the same documents. If Wabtec wants to argue that it shouldn't have to produce documents as of a certain date based upon the allegations, they can make that argument, but that's a discovery dispute. It's not -- I don't think it's an issue that is before the court today.

THE COURT: Do you have any response to this argument?

MR. KIERNAN: Very briefly, Your Honor. With respect to the class, janitor and the hourly employees, in the Duke case, the Seaman versus Duke, they sought to represent faculty and nonfaculty. The nonfaculty were in fact skilled, and the court denied the class, and the reason the court denied the

class was because the evidence that would be required to show impact was so different for the nonfaculty than it would be for the faculty, and that's the same would be true here with skilled and unskilled. They don't have any way of showing.

THE COURT: Couldn't you then just have two separate classes, and you would have the one set of classes, and you would then have to have clearly a plaintiff that would represent their interests, but isn't that how that could be resolved?

MR. KIERNAN: That could be. I don't know why that wasn't resolved in the Duke case in that fashion, but in this case and certainly in the High-Tech case, where hourly employees were never a part of it, and the reason why they are not part of it was for the very reason you described.

The job markets are so broad, unless you have that situation like the two janitorial companies or the fast food example, in the Jimmy John's and McDonald's cases, which have not been certified. As counsel said, they got through the pleading stage. They are going to fight for another day as to whether the class will be certified for entry level positions.

But in Jimmy John's and McDonald's, two cases not briefed in here, but I'll spend 30 seconds on it. In those cases, the plaintiffs alleged how the agreements in those cases would have affected the hourly employees which describes the majority of the McDonald's and Jimmy John's employees.

Here, if you go back through the allegations, paragraphs 31 to 38, there is no discussion of how any hourly union unskilled labor has been impacted by these alleged agreements, and it's why, if you compare, and we cited to the DOJ complaint, the DOJ, they focus on skilled employees throughout, after investigating the agreements and the implementation.

I don't have any further comments, Your Honor.

THE COURT: How about the timing issues?

MR. KIERNAN: The timing issues, other than I think Your Honor raised some of the -- our positions with our trouble with these agreements and, you know, what I heard is we don't have evidence and we don't know and we can't allege under Rule 11 that Wabtec did have knowledge of the Knorr/Faiveley agreement. We can't allege that.

What we want to do is get discovery, have a fishing expedition, not only on whether or not hourly employees in California can be part of this case, but we also want a fishing expedition on whether or not Faiveley had any knowledge four or five years before of a Wabtec/Knorr.

They had an obligation at the pleading stage to allege under Rule 11 the facts that they had. The only facts that they are alleging based on the DOJ complaint is that there were agreements, three bilateral agreements between Wabtec and Knorr, Knorr and Faiveley and later Wabtec and

Faiveley. And on those grounds, any allegations that there's an overarching conspiracy should be stricken from the complaint, and they need to modify or amend the class allegations to tie the class and the employees to the exact agreement for which they are seeking to represent these class members.

THE COURT: The agreement says all employees. That's the way I understand their argument.

MR. KIERNAN: That's the allegation in the complaint, but, Your Honor, that gets us, on the timing issue, with respect to Faiveley --

THE COURT: I'm not talking about the timing issue. I'm talking about the other issue. They are saying the agreement speaks for itself, and that's the problem that the defendants have. They said all employees, and they are taking you at face value and saying, well, let's look and see.

That's what you said, and we know you did it for the skilled because we have this X, Y, Z examples, but the agreement says all employees, and if it's per se, it's per se, and so we should be able to look into that, and maybe later on, the class will be refined to exclude that because you can't show an impact of the conspiracy on those. Even though they said all employees, they only applied to skilled employees.

MR. KIERNAN: Your Honor, we don't check our common

sense at the door, so we look at these facts and it just defies common sense that these agreements had any impact or applied to janitors, line workers, cafeteria, clerical, and as I said, the Department of Justice filed a complaint, the plaintiff's complaint is a near mirror image of that, other than expanding it to all employees. They pretty much copied and pasted all the allegations with respect to skilled labor. That's what this case is about. We should just do that now.

The reason is what we heard is there's not going to be much burden. We just pull some data from various databases. We're talking about 11 different defendants with offices not only in the five states that are alleged in the complaint but they are seeking all 50 states, so we're going to be required for over a combination of all the defendants, over 15, 18,000 employees, hourly and salaried trying to find all their comp information, personnel records, et cetera, from 2009.

THE COURT: I think their argument would be, okay, let's say that's a big burden, but in our discovery conferences, we would maybe pick one or two regions or subsets within regions and look at those, because if you can't show it there, you wouldn't be able to show it elsewhere, and you are not going to have to show it all at once all across the board, so targeted discovery, and if you don't find anything there, then you wouldn't be able to get further discovery on certain

things.

MR. KIERNAN: Optimistic because I think what the response from the plaintiffs would be is, well, if we just take a sample out of California, what about Maryland? That's a different office over there, different janitors.

THE COURT: I'm not saying limited suggests one. It may not be 50. It may be five, for example.

MR. KIERNAN: Hope springs eternal, Your Honor.

THE COURT: I understand.

MR. KIERNAN: The bigger issue is it's just not plausible, and at a minimum, they should have to go back to the drawing board, look at their complaint and make decisions now. They don't want to make the decision now. They have enough facts. They have a requirement under the rules to make good faith allegations with respect to impact across this class, and at this stage, as Weisfeld and Kohl's, Dieter all make clear, they have the burden to show that they can meet the Rule 23 elements.

They can't make it with hourly and unskilled labor. They haven't done it. They haven't done the work or what I think is it's not possible for them to do it.

THE COURT: Your suggestion is that they would eliminate non-skilled hourly employees?

MR. KIERNAN: Correct.

THE COURT: Thank you. Do you want to be heard any

further on that?

MR. HARVEY: Very briefly, Your Honor. Thank you.

THE COURT: That's the friendly suggestion from the defendants.

MR. HARVEY: I think we have been maligning lower paid individuals this afternoon. We have been treating janitors --

THE COURT: They are very important to the morale of the company. They should be highly valued. I don't want any impression to be given that way. It's just that when these agreements are being made, is it possible that that level of salary would be impacted by the agreement, the level of salary for the non-skilled hourly employees?

MR. HARVEY: Absolutely. It is possible. The question now under Twombly is did misconduct occur? Do you get to go down the expensive road of antitrust discovery, which is extensive, it is expensive, it is burdensome on the parties. Do you get to go down that road if you haven't alleged a plausible conspiracy? That's what Twombly is about.

Once you plausibly allege that the defendants have engaged in an antitrust conspiracy which we certainly have, then you get discovery. You get to figure out how broad that is, and if it's expensive, the defendants should have thought of that before they engaged in criminal conduct.

I'm sorry. I don't have a lot of sympathy for them.

We will work with them to minimize the burden. We have no interest in engaging in a fishing expedition or anything else. What we are trying to do is, based on defendants' own data, who was harmed? Can we have one damages model that will prove up harm for that group of people, and we will provide that with supporting evidence, including expert analysis, testimony, documents and so forth at class certification.

Occasionally, Mr. Kiernan has slipped into saying that we have the burden of proving up Rule 23 on the pleadings. Of course no. They are the moving party.

THE COURT: It's a question of whether what you are asserting is possible.

MR. HARVEY: Yes, and they have the burden to prove that it is impossible.

THE COURT: I understand.

MR. HARVEY: I don't have the burden to prove it's possible at this stage, and I would say Mr. Kiernan certainly has not carried his burden on the pleadings that it was impossible. They argue you should use your common sense. Let's not hear from the experts. Let's not look at the documents.

Sure, we agree to eliminate competition for all employees. Yeah, we did that, but let's not bother to figure out whether we really meant what we said. Let's at the pleadings narrow the case to a smaller group of people than we

agreed to harm because of common sense. No.

There are cases where, the McDonald's case and the Jimmy John's case, for example, where lower skilled employees are the entire class. There are no senior level management, engineers in the fast food franchise cases. These are people who, for example, at McDonald's have gone to a place called Burger University which exists and they learn the McDonald's system and they come back and they are more valuable to McDonald's than they are to other places. Lower skilled employees, for example, clerical staff, we're also maligning the clerical staff today apparently.

THE COURT: They are valuable services.

MR. HARVEY: I didn't mean to impute that to the court, my apologies. I was only reacting to arguments of the defendants today. Clerical workers have firm specific skills. They are more valuable to a firm after working there five years than they are on day one. Why is that? Because they learn the systems of that company. They make relationships within the company.

The company learns that they are either a fantastic employee that needs rewarded and kept or they are awful and they wouldn't mind if they leave. If they are still there after five years, they are more valuable, much more so than someone off the street that you've never met where you're taking them on faith based on a piece of paper that they have

written that they know what they are doing. Can those workers be harmed by such an agreement where, if their pay is determined in the same way as part of the same system as more skilled people? Absolutely, it's possible. We'll see if it's likely. We'll see if it actually has taken place.

So that's my comment on that, unless the court has any further questions.

A couple of quick notes of clarification. Mr. Kiernan wasn't sure why the court did not certify the staff with the faculty in the Duke case. The reason why, again, was a reflection of the facts and the evidence. At the time of class certification, there was no evidence that the agreement itself included faculty. All the evidence was -- I'm sorry, that the agreement itself included staff.

All of the evidence were examples of the university's enforcing the agreement as to faculty. That's one thing about the agreement itself. Here we know that the agreement included all employees. It's one way to distinguish the two.

The second is that it turned out that staff were paid as part of an entirely different HR system than faculty. When we attempted to certify faculty and staff, we proved up damages for the faculty and we had a separate analysis which was kind of akin to a pass-through analysis to establish how the staff were paid because we didn't have the same data as faculty, so it was an entirely different way of proving up

their damages. For those two reasons, the court said you can have faculty class, but not the staff class. Here we already know that the agreements included all employees, and the second question, where does one pay system end and another one begins, we'll figure out in discovery.

The other comment that I wanted to respond to was that we have no allegations in the complaint about harm to all employees and that's not true. For example, in paragraph 36, we are very clear that the very mechanism I've been talking about today, that is the top down mechanism when pay is set affects all employees.

The third, going back to the overall conspiracy argument, Mr. Kiernan expressed concern with undue burden on Wabtec if it has to search for documents relative to Faiveley prior to 2014. Well, I think that argument may have something to be said for it if Wabtec did not enter into the misconduct until 2014, but Wabtec entered into the very first agreement in 2009 with Knorr, so as a practical matter, how does this discovery process work?

We are currently in negotiations over custodians. They will pull e-mails from those custodians. This dispute will have no impact on what custodians are pulled. And then we discuss a list of search terms that are applied on those e-mails. I can't imagine a search term that would be different because of this dispute. Those search terms are

run. The responsive documents are pulled and produced.

I would submit that the burden on Wabtec would not change at all depending on this issue. They would do the exact same discovery process, so I don't see the burden.

I think unless the court has any further questions --

THE COURT: I'm fine.

MR. KIERNAN: Your Honor, can I make one note as Mr. Hamer is approaching the bench? I think this is clear from the record, but given that I've heard it twice, and I don't normally do this, but neither my client nor I have maligned any of Wabtec's employees or any employees of Knorr or Faiveley.

THE COURT: At any level.

MR. KIERNAN: And the comment was unfair. The case, as they allege, is about skilled employees which is what they allege and the Department of Justice, and we highly appreciate all of our employees, including unskilled. Skilled just refers to, as they define it and the Department of Justice, employees who gain skills unique to the railroad industry. Ones who may not have the same opportunities outside of the industry than others who are unskilled who have much broader opportunities outside the railroad industry. Thank you, Your Honor, for letting me have that moment.

MR. HAMER: Good afternoon. Your Honor, I'd like to address the rule of reason argument. First though on the

Bendix argument, we agree with the court's observations. Don't have any comments there unless the plaintiffs do, and we are happy to address those if they argue it.

On the rule of reason issue, I'll try to be very brief, we are respectful of the court's views and would ask, if that is the court's decision, that it be very clear in the ruling that of course the issue can be revisited later in the litigation as the record develops.

THE COURT: Yes.

MR. HAMER: That it could be rule of reason or per se, first of all, and second of all, consistent with some of the case law, including In Re Brokerage where the third circuit suggested the plaintiffs plead at their peril, so if they made a choice today to plead only per se, we don't want to hear a year from now that they want to transform it into a rule of reason case. They have an opportunity now to plead that and have chosen not to.

THE COURT: I think that becomes a question of prejudice at that stage.

MR. HAMER: Yes, Your Honor. So if I can just briefly address the substance of it. For the reasons Mr. Kiernan said, it is an important issue. We fully recognize that most courts have deferred the issue until a more fully developed record and have not passed judgment on per se or rule of reason at this juncture. The reason it's

important here in this case is for all the same reasons we have been talking about today. Those same issues, in effect, the relevant market.

It's not obvious in this case where plaintiffs believe the effects to have occurred. Pleading a relevant market would require them to make a choice and tell us how broadly it is, how many employees are in or out of the class, is this a market that only involves these two defendants or does it involve other employers in the railway industry or beyond that. Since the geographic footprint of these parties is very different, many classes of employees are not likely to compete even among the defendants.

Those are things that a relevant market allegation would require the plaintiffs to make a choice on that would substantially narrow and focus this case for all the same reasons we have been talking about. So the plaintiffs want to avoid that here by labeling this as a per se case, and the allegation or the analogy to customer allocation cases is kind of a spine of much of that argument.

Addressing that, the labels don't always give us the answer, and we would like to get beyond that label. The reason we say that is there are a couple of examples where the courts have been faced with similar arguments for plaintiffs. Bogan versus Hodgkins, the second circuit case we discussed in our briefs, was a case where there was a no-poach arrangement

and the plaintiffs analogized it to a supplier agreement, and the second circuit said that the facts don't bear that interpretation. They don't comprise the entire set of suppliers for their services. They got beyond the label and looked at the effects.

U.S. versus Brown, the third circuit case from 1993, was a case among the ivy league schools to fix the method by which financial aid was distributed. The DOJ alleged that to be a price fixing type of restraint. The courts still said that the rule of reason should apply and rejected the argument that per se should apply to that. The only point is that, contrary to what plaintiffs say, simply labeling it as one type of restraint doesn't answer the question.

I would focus on the language Mr. Harvey said earlier, and I wrote it down to get it correct here. He said, "How labor markets work can be surprising." He said that in the past argument. That's exactly right. It's important not to make categorical judgments about restraints. It's important to look at how they operate, and plaintiffs are asking for a categorical judgment with the per se rule.

The logic by which we are asking the court to consider --

THE COURT: I have a question for you. This is a hypothetical. You are in a fairly large metropolitan area and there are five manufacturers of widgets and it's important

that you have skilled workers to make those widgets, so two out of the five enter into a no-poach agreement. They are friendly. They see each other at their clubs or whatever, so they talk about it and they say at least we'll eliminate the competition between us. We still have three others out there that will be mainly competing, but at least it's between us. We'll have the no-poach agreement for all our employees.

So they enter into an express no-poach agreement such as is alleged in this case. The fact that there are three others out there in that existing market, would that defeat the per se approach at the pleading stage?

MR. HAMER: My reaction to that --

THE COURT: Is it just per se illegal? You can't do that no matter how big or how wide or how many other participants in that market there are.

MR. HAMER: My answer to that would be for this type of restraint for a non-solicitation or no-poach agreement, you have to look at the effects, so it could very well be the case that there isn't any effect on competition among those five employers. There's no effect on wages. There's no effect on the ability of those employees to move and find alternative employment.

What it says to me is that should be something that the rule of reason should address. The way I come at that answer is thinking about Eichorn, so the third circuit applied

the rule of reason. What the courts have been telling us is, to determine whether the per se rule should apply, it has to be immediately obvious that there's harm to competition and you have to have a history, you have to have seen cases before you in the past applying the rule of reason, and it becomes clear that it's anti-competitive. You don't need to apply it again, in other words. You can take a shortcut and make it per se.

THE COURT: I think the government's argument is it's so pernicious that that's why the rule of reason would apply. The only reason for the agreement is to stifle competition.

MR. HAMER: So the reason I mentioned Eichorn is simply because if, to address that point, if the court has examined the effect and found an absence of anti-competitive effect, it should give us pause as to whether the per se rule should apply.

THE COURT: That may be in a fully developed record as opposed to at this stage.

MR. HAMER: Exactly, Your Honor. Exactly. So our only point is we want the ability to develop that full record and apply the rule of reason to have the trier-of-fact assess what the effects are. It's not clear to us there's a categorical answer that's it's always going to impact competition.

Eichorn looked at the restraints after determining

the rule of reason applied and said that he didn't find an effect on the cost of labor in the market or even the ability of the plaintiff to find alternative employment. That's not the considerable judicial experience that would warrant per se treatment in the future of such cases. Bogan, that I mentioned earlier, same situation. Summary judgment was affirmed by the second circuit finding no obvious anti-competitive effect from the no-poach agreements.

That's not to say that there couldn't be that outcome. Of course there could. The whole trial would be about weighing those issues and determining what the outcome should be. Our point is simply that shouldn't be foreclosed by labeling it per se. It should allow a full assessment of rule of reason as the trend of the Supreme Court and the third circuit has been towards.

THE COURT: But the plaintiff is limiting itself at this stage to the per se which could be at their peril later depending on a prejudice argument.

MR. HAMER: Yes, Your Honor. Thank you for mentioning that. As my initial comment suggested, we recognize that that is often the outcome of many of the cases at the pleading stage. We just request that that point be clear in the order.

We do feel this is important here in this case because often you can tell what the relevant market is. The

example you gave is pretty clear. They are all in one location. You know who the competitors are. You know what they are selling. You know where they are. The geographic market is clear. Here, it's very opaque. We have no idea who is in or out of the market, both at an employee level, position level and employer level. Geographically, it's not obvious at all why the employees would be competing among these employers, which suggests that the effect that they're suggesting exists may not exist, and that suggests that per se is not the outcome. Per se conclusively presuming an effect is not the answer here in this case for these restraints.

So I'll stop there unless the court has further questions.

THE COURT: That's fine. Thank you.

MR. HAMER: Thank you, Your Honor.

MR. HARVEY: What is at issue now is not the standard that will necessarily apply at trial. It is whether we have sufficiently alleged a per se violation of the antitrust laws, and what have we alleged? We have alleged that the defendants entered into an agreement to eliminate competition for each other's employees that had no other purpose. It wasn't part of any other agreement. Its only purpose was to eliminate competition. That is known as a market allocation agreement. That's exactly what it is. I won't compete there if you won't compete here. That is, by definition, a market allocation

agreement. That is per se unlawful.

If it turns out that the no-poach agreement between Knorr and Wabtec was part of some joint venture and they can establish it was reasonably necessary to this incredibly productive joint venture, then we may very well be in some other world at trial. That's assuming -- I want to be cognizant of your comment about we're proceeding at our peril. Subject to that qualification.

The argument here is --

THE COURT: You have to amend your complaint. That's the issue. That's a question of the timing and I can't totally prejudge it, but the longer it goes on, the more difficult it can be.

MR. HARVEY: One of the first things we'll figure out is whether these agreements were part of anything else, and we'll act promptly.

Why would the court engage in a rule of reason inquiry to figure out whether an agreement whose sole purpose was to eliminate competition is anti-competitive? Of course it's anti-competitive. That's its purpose. That's what we've alleged, and everything we know about it is that's the reason they entered into it, to suppress the pay of the employees.

I want to respond to the specific arguments that Mr. Hamer made. First, with respect to my comment that labor markets are surprising, they are surprising in that individual

employers can exercise much more market power over their own employees than you might think. These kinds of agreements can be much more pernicious, can suppress pay much more than you may think if your frame of reference is a conspiracy about products. There are many reasons for that, which I would be happy to get into, but I don't think it's necessary at this point.

It certainly provides no reason to think that a market allocation agreement in this context would be pro competitive. To the contrary, it provides only further reason to presume that it's anti-competitive.

With respect to the cases Mr. Hamer cited, in the Bogan case in the second circuit that was an unusual case where the restraints were only within the same brand. They were all within the same insurance company brand, and they had this kind of arrangement where different levels of a hierarchy can hire their own employees, and there was an understanding that a certain level of this hierarchy had restrictions with respect to hiring from other levels of the same hierarchy.

That's very different from this case where of course Wabtec and Knorr are not part of the same hierarchy. They are not franchisees of the same franchisor. They are completely distinct companies with a different identity, different brands, complete separation as a corporate matter, and moreover, in the Bogan case, because of this, there was a

prominent vertical dimension to the agreement. Whereas, here, it's purely horizontal which is an important distinction in antitrust.

With respect to the Brown case, that was a case in which the DOJ challenged an arrangement among the ivy league schools to affect how financial aid is given to the students, and the argument by the universities there was, first, this is not a naked restraint, meaning that it's not a restraint on trade on its own, it's part of this larger enterprise of deciding how much financial aid to give particular students.

The universities argued that this arrangement succeeded in giving more financial aid to more students in a more equitable way, and the circuit court there held that, well, if you can prove that, then you may get the benefit of rule of reason, but that's a factual question. We'll see.

In the Eichorn case in the third circuit, what was at issue in Eichorn was a different situation from this. It was a no hire agreement that was one ancillary to the sale of a business, and it was limited to an eight month period. Here, there's no allegation that Wabtec and Knorr were contemplating selling one to the other. These agreements were not tailored to a specific time or scope of employees based upon the pro competitive activity.

Instead, they were, as we have been discussing earlier today, all employees with no limit until the end of

time until we say otherwise. That is not what is at issue in Eichorn. If there was any doubt of that, the third circuit itself clarified in the Weisfeld case, which Mr. Hamer also mentioned. That was the class certification decision. Weisfeld misapplied the Eichorn decision by saying exactly what the defense is arguing today. That means that no-poach agreements are always rule of reason full stop, and the third circuit, in affirming the denial of class certification, said we don't need to reach this because it's a class certification decision, but what was at issue in Weisfeld was very different than what was at issue in Eichorn, and a different legal standard may apply.

So the third circuit, I think, made it clear, and this was nearly 20 years ago, that it had already anticipated that no-poach agreements could be per se in lawful market allocation agreements and yet in the notice of supplemental authority we provided, the tenth circuit makes that point exactly, that this is -- and that case, I think, makes the point really well, because it wasn't an agreement that eliminated all competition in the market. It was a sliver. It eliminated a sliver of competition for customers.

It was a customer non-solicitation agreement that only affected a small portion of relevant customers. They competed for all kinds of other customers, and the question was, is that per se or rule of reason. The district court

thought, well, maybe this is a different industry, maybe because the agreement sounds a little different, I'll apply the rule of reason, and the tenth circuit said no. It doesn't matter if there's still some other form of competition somewhere. If there's a naked restraint of competition, it's a market allocation agreement and it's per se, and the district court followed suit in the decision that came out just last week, and I think it's a great analysis.

I think on per se, unless the court has any further questions, I don't have anything else.

THE COURT: No. I'll hear from the government.

MS. MEKKI: Good afternoon, Your Honor. Thank you for the opportunity to be heard. May it please the court? My name is Doha Mekki, and I represent the United States of America.

The United States filed a statement of interest in this matter to express its views about the law applicable to horizontal market allocation agreements affecting labor and to urge the court to reject defendants' extraordinary proposition of law that defendants would like the court to adopt, and that's that all no-poach agreements should be assessed under the rule of reason.

Such a broad categorical rule would ignore important and sound legal and economic reasoning, treating market allocation agreements affecting labor the same as any other

horizontal market allocation under Section 1.

I'd like to explain further, and as I've read the briefing and heard argument today, it seems that a number of labor antitrust issues are being muddled, and if it would be helpful to the court, I'd like to lay some foundation and talk about the different kinds of cases that are coming up in the briefing.

THE COURT: Okay.

MS. MEKKI: At the outset, the horizontal market allocation is just an agreement to divide a market. It can be done by territory. It can be done by customer. It can be done by labor. The Supreme Court has longstanding precedent that all such agreements are per se violations of Section 1. That was true in its decision in Palmer versus BRG of Georgia and it was true in the United States versus Topco.

And the third circuit has also recognized that horizontal market allocations are paradigmatic examples of per se violations under Section 1 and that came from In Re Insurance Brokerage Antitrust Litigation.

It's also important to note that the United States has criminally prosecuted horizontal market allocations under Section 1 precisely because they are per se unlawful under Section 1, and a number of courts of appeals have affirmed those convictions. For example, in the second circuit, United States versus Koppers which was a case about the

allocation of territories in the sale of road tar, the fifth circuit, United States versus Cadillac, where that case is about the allocation of garment providers, and the sixth circuit has a very interesting case, United States versus Cooperative Theaters that addresses the hypothetical that Your Honor posed to Mr. Hamer earlier about what would happen if there were five manufacturers and only two of them entered into a naked no hire agreement.

There, there were two movie theaters that entered into an agreement to allocate customers, and indeed the companies were found criminally liable by the district court, and that was affirmed by the court of appeals. So to answer your hypothetical, Your Honor, very directly, no, it would not matter, and that agreement would be per se unlawful under Section 1.

Just to continue, the ninth circuit affirmed the conviction in United States versus Brown, which was a case about the allocation of billboard sites.

That case in particular is very important because the allocation of billboard sites is what we, as antitrust lawyers, refer to as input markets. So they are materials, products, services that companies use in order to create an output, and that's important because labor is an example of an input market.

It's no defense to a horizontal market allocation

agreement that the agreement has never been considered per se unlawful in a new industry or a new type of market, and indeed we get that explanation from the Supreme Court in Arizona versus Maricopa County, where the court explains that judicial experience with the per se category stems from experience with a particular type of restraint.

So the government would urge the court to consider the alleged agreements in this case as just a species of horizontal market allocation in a new per se category as the defendants have asked the court to consider.

THE COURT: Are you in agreement with the court's understanding that labor is treated akin to a product?

MS. MEKKI: Yes, Your Honor. We completely agree with Your Honor's position at the outset and would only underscore our belief in exactly the leading antitrust treatise that Your Honor cited at the outset, that an agreement among employers not to hire certain employees is akin to a product division agreement.

The issue before the court today is whether plaintiffs have sufficiently alleged facts to support a per se violation under Section 1.

THE COURT: Just to be clear, you are not taking the position on the class allegations?

MS. MEKKI: Respectfully, Your Honor, no, we are not taking a position on frankly any issue other than the

application of the per se rule.

As I was saying, a number of district courts have faced the exact issue before the court today, whether plaintiffs have alleged facts sufficient to go on to discovery under the per se theory, and indeed there have been several. There's United States versus eBay. There's In Re High-Tech Antitrust Employees and there's In Re Animation Workers.

To get into the cases that are cited in defendants' briefing in support of their view on what rule should apply, I categorize them in two buckets. They are inapposite largely for the following two reasons: They either deal with restraints that aren't horizontal at all, so, for example, they might deal with an intrafirm agreement like Bogan, or they deal with a franchise like Mumford versus GNC, which I understand was before Your Honor some years ago.

The other category of inapposite case is cases under the Ancillary Restraints Doctrine like the Eichorn case that Mr. Hamer referred to. Just to take a step back, the Ancillary Restraints Doctrine is important to understand. There, a restraint that is horizontal and would ordinarily be condemned under the per se rule is subject to analysis under the rule of reason if it is reasonably necessary to a separate legitimate transaction or collaboration.

Eichorn is really the paradigmatic example of the Ancillary Restraints Doctrine. There was a narrowly tailored

no hire agreement that was ancillary to the sale of the company, so that's not the case before the court today at all.

My final point, Your Honor, unless there are more questions, it is just that the DOJ has had significant experience not only prosecuting horizontal market allocations but we have amassed considerable experience over the years addressing cases that affect labor markets exactly like the underlying case, United States versus Knorr Bremse and Wabtec and through United States versus Adobe, Apple, Google, Intel, Intuit and Pixar, United States versus Lucasfilm, United States versus eBay and the underlying case, it is our view that labor markets really should not be treated any differently under Section 1.

And so if there are no questions from the court, I would like to conclude by again thanking the court for the opportunity to be heard and urging the court to find that plaintiffs have adequately alleged a per se violation under Section 1.

THE COURT: Thank you.

MR. HAMER: Your Honor, I'll be very brief. I just wanted to touch on a couple of points that were mentioned. So first of all, with Mr. Harvey's comments, he mentioned the absence of any issues about pro competitive effects. We're obviously at the pleading stages. One of the reasons we can't talk about those issues and that's something for a later time.

The Bogan case he mentioned, he distinguished it because it was an intrafirm agreement, but the court said, as we mentioned in our reply brief expressly, that even if the agreement were intrafirm, between two firms not the same corporate family or the same brand, we would still not afford it per se illegal treatment because the harmful effect on competition was not clearly apparent, which is the main point that we have here about this.

Rule of reason applies if you are not sure what the effect is going to be. If you are sure what the effect is, if it really is clear from prior cases that the effect on competition is an anti-competitive effect, you don't need to apply the rule of reason. There are several examples where no-poach agreements have been examined and the effect hasn't been seen.

On the Eichorn case, which both Mr. Harvey and Ms. Mekki mentioned --

THE COURT: Those are the ones where the government was arguing there were the ancillary aspects.

MR. HAMER: Exactly, Your Honor. In Eichorn, the no-poach agreement was ancillary to the sale of the business, and that was part of the discussion about whether the rule of reason or per se applied. After determining they should apply rule of reason, the third circuit looked at the restraints and it didn't conclude that because there was really bad effect

and there was a good pro competitive effect, the pro competitive effect of being attached to a sale of a business outweighed the anti-competitive effect. It looked for the anti-expectative effect and said the following: "Because market realities reflect that the no hire agreement did not have a significant anti-competitive effect on the plaintiff's ability to seek employment within this broader telecommunications market, nor that it fixed the cost of labor in the industry, we conclude that it was not an antitrust violation under the rule of reason."

The reason that's important, those words from the third circuit, is that you have to have, and it's also in the Eichorn case, you have to have "experience with a particular type of restraint that enables the court to predict with confidence that the rule of reason will condemn it."

Our only point is you can analogize no-poach agreements to customer allocations, market allocations, but the specific --

THE COURT: Could all of this be fodder for a summary judgment issue or trial issues as opposed to pleading issues?

MR. HAMER: Yes, Your Honor. Yes, absolutely. Our only point is we certainly want the ability under the rule of reason to make these arguments and identify where the effects are and frankly require the plaintiff to explain where they think the effects are. That's --

THE COURT: You don't have to do that if they make sufficient allegations of a per se violation.

MR. HAMER: Correct, Your Honor. The reason we are urging the court to consider it here in this case is because there's so many concerns about where the relevant market is and where the effects are. We think it's important to find out now from the plaintiffs where they believe the effects have occurred. It's not obvious to us where the relevant market is.

If I could briefly address the Weisfeld case. The third circuit, in affirming that decision, did not decide that, in a naked per se no-poach case -- a naked no-poach case, the per se rule should apply. That issue was raised on appeal, but the court didn't pass judgment on it.

THE COURT: Because there was no antitrust impact.

MR. HAMER: Exactly right, Your Honor. The Kemp case that was mentioned a couple of times from the tenth circuit, what I take away from that case is it was a criminal, a criminal allocation case, where initially the district court did not apply the per se rule. They applied the rule of reason, and it went up to the tenth circuit. It took three decisions for the per se rule to be applied.

That simply tells me that it's not always -- it's not always obvious that the per se rule should apply, and when there's any doubt, if anything is clear from the cases, the

rule of reason is the default. That's the presumption that should be applied to the restraints and the starting point, unless the plaintiffs can demonstrate why it's so obviously harming competition the per se categorical rule should apply to it.

THE COURT: What about all the treatise riders in those cases that look at it as a market allocation and therefore that's per se and it's been found in repeated cases if you have a horizontal agreement, that the market allocation situation can be a per se?

MR. HAMER: We appreciate and understand that, Your Honor. Only comment there is that there have been a couple of cases, Weisfeld and Molinari, where there were naked no-poach agreements and the court still applied the rule of reason. We certainly --

THE COURT: At the pleading stage?

MR. HAMER: The Molinari case was at the pleading stage. There were two Molinari cases. The first one determined whether the per se or rule of reason applied. They determined that rule of reason applied naked no-poach agreement. The second decision dismissed the claim for failure to plead irrelevant market for many of the same defects, Your Honor, that are present in this case. We urge the court to look at that case from 2012 from this district court.

We are certainly not making a categorical statement that all no-poach agreements should be heard under the rule of reason. We are just talking about this case. In this case, there are a lot of concerns about where the effect really is and whether there is an effect here. That's transparent from the pleading, from all the things we are talking about on all these issues today. That tells me the rule of reason should apply so the effects can and should be weighed. Thank you.

THE COURT: Would you like to address the Molinari case?

MR. HARVEY: I would. The Molinari case is not a naked horizontal market allocation case. It's a case concerning a vertical vendor agreement that only restricted the vendors that could work at one company, so the analysis there focused on -- characterized the allegations as a single product market because there was only one company at issue.

It's distinguishable from this case in a number of different ways and says nothing about what's at issue here, which is an agreement between two horizontal competitors that, on the pleadings, have no purpose other than eliminating competition with each other. That's a per se violation. I won't go through all of defendants' cases, but I'll say that the defendants did not cite to a single case that involved a naked horizontal market allocation where anything other than the per se standard applied. Not a single case. So the

defendants want this court to be the first. I think the court should decline that invitation.

One other thing I'll mention is that the specific cases that defendants put the most emphasis on tend to be those from 20 years or so ago that predated what I think is fair to say is a modern consensus among not just the U.S. Department of Justice but the Federal Trade Commission, over ten states' attorney generals, the leading antitrust treatise, as we discussed earlier, that these kind of agreements are market allocations and should be analyzed as such.

That has been the consensus view of every court to have looked at this since the U.S. DOJ's landmark enforcement action against Google, Apple and so forth in 2010. Since then, the courts have been uniform on this question. In the ninth circuit in the northern district of California, in the seventh circuit in McDonald's, in the fourth circuit in Duke. I don't think the third circuit should create a circuit split on this issue. There's certainly no reason to do that on the pleadings.

THE COURT: Okay. Anything further from the government?

MS. MEKKI: I think we are fine for now. If it would be helpful to discuss any of the cases, Molinari, Bogan, et cetera, for the court, we are happy to do so.

THE COURT: I think the plaintiffs' counsel has

already addressed that.

MS. MEKKI: Nothing further.

MR. HAMER: Your Honor, just one point. To be clear, by my silence, I didn't mean to accept what Mr. Harvey said. We don't necessarily agree that the labor is an input market here. We reserve all the arguments on that for later in the case when we have a record to address.

I do dispute that Molinari is not a naked horizontal agreement. There are multiple parties involved in that situation and certainly Weisfeld without question was horizontal, interbrand competitors agreeing not to solicit each other's employees. Nothing further.

THE COURT: Okay. So I'm going to order the transcript at the joint cost of the parties. I think we have another status conference that will be coming up next month, so we'll be working on this in the interim, and you've already received the DOJ materials; is that correct?

MR. HARVEY: Yes, Your Honor.

THE COURT: Did the DOJ materials uncover some of the effects going down to the non-skilled hourly workers? Is there more that you need to gather?

MR. HARVEY: Well, the question of the impact to the --

THE COURT: This is for the class allegations.

MR. HARVEY: Yes. With respect, I don't think there

are any unskilled workers. I think if you are paying someone to do a task, they have some skill that's worth something.

THE COURT: We are talking about somebody that has a unique skill in the railway industry. I agree. I think somebody who may be in the clerical level is very skilled at what they are doing and there are certainly skills in the janitorial level in terms of how you approach cleanliness, the tools you use and that kind of thing. There's lots of different skills, but I think when we're talking about skilled workers in this context here for this case, we are dealing with somebody who has some unique skill pertinent to the railway industry.

MR. HARVEY: I think -- sorry to push back again, but every employee of a company who is experienced in that company has company specific skills that are valuable, and that is even more specific than the railway industry. It's specific to the company, so I don't accept the premise, but with respect to the question of what have we seen from the materials, I don't think we've seen anything specific to a janitor or to a clerical staff worker.

I don't believe we've gone through all those documents with that specific question in mind, so I want to be cautious about it, but let me also say that the question of whether people lower on the hierarchy were impacted by the agreement is largely proved by the pay data and doing a

30(b)(6), for example, of people in charge of the HR system, figuring out are they indeed part of the same pay system or not, those are the kinds of -- types of evidence that we have used in the past to decide that question and I would expect that to be very relevant here.

What we have seen though is, in several documents, very clear that the agreement pertained to all employees. We have not seen any exception, any carve-out. These are written documents exchanged between the parties, so there appears to be no reason to doubt at this stage that the misconduct itself concerned every employee at the companies.

THE COURT: So at this stage, I'll take this under advisement. I've ordered the transcript, and we'll be together -- it may not necessarily need to be in person unless there's some basis for argument or some contention between the parties. We can do it by phone. Thank you all. This hearing is adjourned.

(At 4:10 p.m., the proceedings were adjourned.)

C E R T I F I C A T E

I, BARBARA METZ LEO, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case.

\s\ Barbara Metz Leo
BARBARA METZ LEO, RMR, CRR
Official Court Reporter

03/04/2019
Date of Certification